

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 1582/2015

In the matter between:

ROSES UNITED FOOTBALL CLUB (PTY) LTD

Applicant

and

ST ANDREWS SCHOOL

Respondent

HEARD ON: 31 MARCH 2016

JUDGMENT BY: MOLOI, J

DELIVERED ON: 7 APRIL 2016

MOLOI, J

- [1] The applicant is the defendant in the main case (the claim) and lodged this application to amend a plea it delivered in response to the summons issued by the respondent, the plaintiff in the main case (the claim). The application is opposed.
- [2] On 31 March 2015 the respondent issued a summons against the applicant based on an agreement between the parties annexed to the particulars of claim and marked Annexure "A". The applicant admitted certain allegations made in the further particulars of claim in its plea. On 19 October 2015 when the respondent requested further particulars in terms of Rule 21(2) of the Uniform Rules of Courts, the applicant realised that there were some

discrepancies between the further particulars and the agreement on which they were based as contained in Annexure A and that the admissions made required to be amended as a result.

[3] The following were the purported discrepancies:

3.1 In paragraph 4.3 the particulars of claim read

“The defendant would be responsible for the maintenance of the leased premises at its own costs which would include the following:

4.3.1 The maintenance of the leased premises more specifically the sport fields and cricket ground and the pitch at a standard comparable to the main cricket field and pitch situated on the Plaintiff’s school ground.”

However, the agreement itself, Annexure ‘A’ read as follows:

“2. Roses United shall maintain the leased area at their costs and in particular the fields at a standard or level comparable to the St. Andrews a cricket field situated on Saints School grounds.”

The leased area is described in the agreement as follows:

“And whereas Roses United has previously utilised the cricket/football/rugby field and the relevant change rooms at the premises (the leased area).”

The cause of complaint in the above is that in the agreement itself there is no reference made to “the pitch” and the inclusion of that phrase in the particulars of claim effectively altered the terms of

the agreement between the parties. It was contended in argument that maintenance of a pitch is a specialised undertaking going beyond the maintenance of a cricket field and therefore the inclusion of a pitch in the particulars of claim extended beyond the maintenance envisaged in the agreement.

3.2 The second ground of complaint is that in paragraph 4.4 of the particulars of claim the following is stated:

“4.4 The leased premises would only be used by the Defendant for the training purpose of its professional soccer team, provided such training and use did not clash with any school activity arranged and organised by the Plaintiff and/or contrary to the contravention of the aforementioned school act.”

It was argued that the above altered the wording of the agreement and created the impression other than that agreed to in the agreement which stated in its paragraph 3:

“3. Roses United shall only use the area in the main for training purposes of its professional soccer team. This shall also not however exclude non-professional soccer games and other activities for Rose United conditional upon the last two mentioned activities not clashing with any school activity nor be in contravention of the head lease with the Mangaung Municipality or the South African Schools Act No. 84 of 1996.”

3.3 The submission was made that there was a huge difference between the particulars of claim and the agreement if regard was had between paragraph 4.6 of the particulars and clause 4 of the agreement.

Paragraph 4.6 of the particulars of claim stated:

“4.6 At all material times preference would be given to the use of the leased premises by the learners of the Plaintiff’s school and more specifically for the use of the cricket field and cricket pitch for training and matches.”

Clause 4 of the agreement provided:

“4. It is recognised and agreed that Saints will also utilise the fields situated on the leased area from time to time. Both Saints and Roses United shall make arrangements among themselves for the relevant timeslots for the use of the fields by themselves. Wherever possible preferences shall be given to Saints for the use of the fields with particular reference to the usage of the field for cricket training and/or matches.”

[4] It was conceded during arguments before me that both the further particulars and the agreement were before the applicant when the plea was drafted and subsequently delivered. It was also conceded that the discrepancies, if any, were minor in nature. It goes without saying that the validity of the disagreements are not for me to decide. Mine is to determine whether or not an amendment should be granted.

[5] Both parties correctly submitted that the granting or not of an amendment especially the withdrawal of an admission made lies in the discretion of the court. This discretion, like all other discretions the Court is at liberty to exercise, must be exercised judiciously bearing in mind certain principles that may underlie

each discretion. In this case the court must first consider whether an explanation was given as to why the admission was made and second why the admission is now sought to be withdrawn: **Amod v SA Mutual Fire and General Insurance Co. Ltd** 1971 (2) SA 611 (N). In this regard the only explanation offered by the applicant is that only when the request for further particulars in terms of Rule 21 (2) was made it was realised that the terms of the agreement were couched differently from the particulars of claim meaning, in essence, when the plea was drafted the drafter assumed the particulars of claim were in line with the terms of the agreement.

- [6] When the court considers the granting or not of an amendment two guiding principles come to the fore, namely (a) was there a *bona fide* mistake on the part of a party seeking to amend and (b) will the amendment cause prejudice to the other party which cannot be cured by an appropriate costs order. In its founding affidavit, the applicant submitted that the intended amendments were caused by the error that was based on its acceptance/expectation that the particulars of claim would be in line with the agreement and was, consequently, not *mala fide* and that there would be no prejudice against the respondent. These allegations were not disputed in reply and the court can accept they are valid. The primary objective, however, in allowing an amendment is to see to justice been done: **Moolman v Estate Moolman** 1927 CPD 27. Justice can only be done if the parties are allowed to properly ventilate the dispute between them so that the court can be seized with the determination of the real issues between them: **Trans-Drakenberg Bank Ltd v Combined**

Engineering (Pty) Ltd 1967 (3) SA 632 (D): To deny a party an amendment that can only serve to ensure justice is done will be inexcusable.

[7] In this matter it is clear that the objective of the proposed amendments is to bring the plea in line with the agreement in the light of the alleged differences between it and the particulars of claim. Whether that is so or not is to be decided at the trial. The application for amendment remains on indulgence sought from the court especially where both the particulars of claim and the agreement were provided to the applicant before the plea was drafted and served. The application to amend will therefore have cost consequences for the applicant.

[8] In the result, the following order issues:

8.1 The application for amendment of the plea is granted.

8.2 The applicant is ordered to pay the costs of the application.

KJ MOLOI, J

On behalf of applicant: Adv. GJ Bredenkamp
Instructed by:
Bredenkamp Attorneys
Bloemfontein

On behalf of respondent: Adv. L Strating
Instructed by:

Symington & De Kok
Bloemfontein

/PC